United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

original w/ affidavit of mailing CORRECTED

75-1390

B P/S

To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1390

UNITED STATES OF AMERICA,
Appellee,

—against—

JOSE LaBOY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Jose LaBoy appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Bartels, *J.*), entered November 14, 1975, which judgment convicted appellant, after a jury trial, of conspiring to distribute quantities of cocaine in violation of Title 21, United States Code, Section 841(a)(1). Title 21, United States Code, Section 846.[1] On November 14, 1975, Judge Bartels sentenced appellant to imprison-

[1] Appellant was also charged in a second count for the possession of cocaine, with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1). The jury reported that it was unable to reach a determination as to appellant on this count and a mistrial was declared. Further prosecution on that count will abide the outcome of this appeal.

ment for 3 years and a special parole term of 5 years.[2] Execution of this sentence was stayed pending this appeal.

On appeal, appellant asserts five grounds upon which he alleges his conviction should be reversed: (1) conduct of the trial judge deprived appellant of a fair trial; (2) the court's charge on the crime of conspiracy failed properly to define the crime; (3) evidence linking appellant to the conspiracy was insufficient to permit a jury to convict; (4) the indictment did not alert appellant to the acts with which he was being charged; and (5) the Government deliberately deprived appellant of the opportunity to call Israel Rodriguez as a witness by indicting him.

Statement of the Case

A. The Government's Case

Alberto Pineda, a paid informant cooperating with the Drug Enforcement Administration, was the main witness for the Government. He testified that he met a man named Alberto Guinone in Brooklyn, New York, during November, 1974 (77).[3] Guinone informed Pineda that he knew of various people who had cocaine for sale.

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[2] There were two co-defendants named with appellant in the indictment: Luis LaBoy, appellant's cousin, pleaded guilty prior to the trial of the appellant; Israel Rodriguez successfully moved to have the indictment dismissed as to him, the dismissal occurring on September 18, 1975. This Court reversed the District Court and ordered the Rodriguez indictment reinstated, *United States* v. *Rodriguez*, — F.2d — (Slip op. 1429; decided January 5, 1976). Mr. Rodriguez is now awaiting trial.

[3] Page numbers in parenthesis refer to the trial transcript. Page references are to Pineda's testimony; secondary page references refer to the corroborative testimony offered by surveillance Agents Robert Jones (292-315) and Gerald Carr (316-330) as well as Agent Ronald Melvin the undercover agent (207-293).

Guinone subsequently introduced Pineda to appellant (introduced to Pineda as "David"), appellant's cousin Luis LaBoy, Israel Rodriguez, and Willie Cruz (80-81). During a discussion in Luis LaBoy's apartment at 88 Stone Avenue in Brooklyn, in which all of these people participated, a sale of approximately three ounces of cocaine, at the price of $1,300 per ounce, was planned (84-88). Pineda reported this meeting to Drug Enforcement Administration Agent Ronald Melvin who, in an undercover capacity, was to purchase the cocaine (89, 211).

On November 21, 1974 Agent Melvin met Pineda and Guinone and drove to 88 Stone Avenue, parking around the corner of Somers Street (96-97, 214-15). Guinone and Pineda went up to the same apartment as previously and spoke to appellant, Luis LaBoy and Willie Cruz about the purchase of the cocaine (99-102). The three sellers stated to Pineda and Guinone that they wished to sell one ounce at first and not the larger quantity (103). Guinone and Pineda returned to the car in which Melvin was waiting; Melvin refused, however, to deal for just one ounce. Guinone was then sent to report Melvin's refusal to the people in the apartment (106-110, 217-18). He then returned and informed Melvin and Pineda that he had told the three sellers of Melvin's refusal to purchase one once. Melvin then left (111, 218).

Melvin, Pineda, and Guinone returned to the vicinity of 88 Stone Avenue on November 27, 1974.[4] Pineda and Guinone left Melvin in his car and started to enter 88 Stone Avenue. Before going upstairs, however, they met Willie Cruz and another man who were leaving the building. Willie Cruz told them that the three ounces had already been sold; Pineda and Guinone left the building

[4] After November 27 Guinone was not to be further involved in the transaction.

without going upstairs and reported what had transpired to Melvin (112-115, 220-22, 299).[5]

On December 3, 1975 Pineda went to 88 Stone Avenue, met Luis LaBoy, and drove with Luis to an apartment building at 24 Furman Street in Brooklyn. Luis LaBoy went into the building while Pineda waited in the car. At about the same time Pineda saw appellant leave a nearby car and enter 24 Furman Street with Israel Rodriguez (116-118). Luis returned and told Pineda to go back to 88 Stone Avenue; Pineda also saw appellant leave with Israel Rodriguez. As Pineda was leaving the area his car ran out of gas and he was assisted by Willie Cruz who appeared in another vehicle. After obtaining gas Pineda returned to 88 Stone Avenue where he met with Luis LaBoy, appellant, Israel Rodriguez, and Willie Cruz (118-121). Once in the apartment, they told Pineda that the cocaine would be ready later in the afternoon (122). Appellant thereupon took a box out of a closet and handed it to Luis who then gave it to Cruz. Cruz took a plastic bag containing white powder out of the box; this material was weighed and sniffed by appellant and others. Luis wrapped up the powder and handed the package to appellant, who put it back in the closet (123-126).

Pineda further testified that he called Agent Melvin to tell Melvin he had seen the package. Melvin stated that he could not set up the deal until five o'clock in the afternoon. Pineda then returned to 88 Stone Avenue, where Luis LaBoy was now alone, and Luis agreed to a five o'clock sale (127-128, 222-23).

Later in the afternoon of December 3, 1974, Pineda met Melvin and other agents and it was determined that Pineda would signal the agents on the presence of the

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[5] No objection was taken to the testimony of Cruz' statements.

package by removing his hat. Melvin and Pineda proceeded back to 88 Stone Avenue. Melvin parked around the corner from 88 Stone Avenue on Somers Street. Pineda left the car and went into the apartment where he saw and spoke to Luis LaBoy, appellant, and Israel Rodriguez. Cruz had left. Luis and appellant decided that Luis should carry the package downstairs with Pineda while appellant and Israel Rodriguez would station themselves in the street and keep watch. Before anyone left the apartment appellant took the package out of a closet and handed it to Luis who put it in his pants. Appellant and Israel Rodriguez then left the apartment where Luis and Pineda waited for another minute (129-33, 246-48, 299-300).

Luis and a hatless Pineda left the building and proceeded toward the corner of Stone Avenue and Somers Street where appellant and Israel Rodriguez were standing. Appellant then walked over to Luis and had a brief conversation. Luis and Pineda then walked down Somers Street toward Melvin's car while appellant and Israel Rodriguez remained at the street corner. After entering Melvin's car Luis asked Melvin for the money and Melvin thereupon placed Luis under arrest; the package was seized and the defendants were arrested (134-137, 248-49, 302-04). Appellant and Rodriguez attempted to escape in a car, but were quickly apprehended by an agent (318-325).

The Government's additional evidence was brief. Drug Enforcement Administration Agent Samuel Blackburn testified that he took two packages from appellant shortly after appellant's arrest (336). The two packages taken by Agent Blackburn from appellant were found by the chemist to contain small quantities of cocaine and marijuana. It was the opinion of the chemist that the small package of cocaine taken from appellant originated with the same batch of cocaine from which the package seized from Luis LaBoy had been derived (352). The three

ounce package seized from Luis was 29.6 per cent pure cocaine (346).

B. The Defense Case

David Rodriguez, appellant's brother-in-law and the brother of Israel Rodriguez, testified that he lived at 24 Furman Street with Willie Cruz. Rodriguez stated that the only nickname he had heard used for appellant was "Ray", never "David" (383-390). On cross-examination Rodriguez admitted that his relationship with appellant is a close one. He also stated that he had never heard or been told of appellant's being involved in any drug transaction (396-400).

The defense, in addition, called Israel Rodriguez to the stand outside the presence of the jury. Israel Rodriguez expressed his intention, through his attorney, to invoke his Fifth Amendment rights and not to testify. Accordingly, Israel Rodriguez was not called to the witness stand in the presence of the jury (430).

The appellant then testified in his own behalf that he had never participated in any drug transaction, that he had never been known as "David", and that he had never seen Alberto Pineda prior to December 3, 1974 (432-34). Cross-examination brought out weaknesses in appellant's story: He arrived at 88 Stone Avenue late on the afternoon of December 3 after repairing cars a couple of blocks away in front of his mother's house (442-47). He "dozed off" on a living room couch with only Luis LaBoy in the apartment with him (444-47). After 15 or 20 minutes Israel Rodriguez woke up and asked to be driven to a bookstore in downtown Brooklyn (448-49). Appellant immediately proceeded to leave the apartment with Israel. He did not question Israel about the urgency of travelling during a Tuesday evening rush hour from East New York to downtown Brooklyn (449-50). Appellant

was thirsty, but did not take the time to stop for water (451). He noticed an unfamiliar man in the apartment but did not stop to speak to him (452). He did not stand on the street corner with Israel (453). When they got into the car Israel told him that there was a drug transaction in the offing; it only took seconds for Israel to communicate to appellant the nature of the transaction (456, 462). Appellant left the car to stop his cousin from dealing in drugs and was told it was "none of my business" (455-56). Appellant was curious about what was going to transpire so he stood on the street corner for a while (457). He then decided to depart the area speedily so as not to be near a drug transaction. A car was hit because appellant "misjudged the curb" (458-59). Appellant did not see the agent who stopped him until he was taken out of the car (460). The small package of cocaine found on appellant's possession was given to him by Willie Cruz for repairing a car the previous day (474). He had received cocaine from Willie Cruz "once in a blue moon" (482).

ARGUMENT

POINT I

Judge Bartels conducted the trial in a fair manner.

In Point One of his brief, appellant urges that the conduct of Judge Bartels deprived him of a fair trial. He makes three separate arguments in support of that conclusion. Initially, appellant urges that the Court unduly interfered during the examination of Alberto Pineda. Appellant also urges that the Court unduly interfered with his counsel's summation. Thirdly, appellant urges that the Court committed "two glaring evidentiary errors" (Brief, p. 14). In that respect, appellant argues that

prior consistent statements made by Pineda to Agent Melvin were improperly adduced, and also that the Court erred in allowing a limited number of leading questions to be asked by the prosecutor.[6] We believe that appellant's arguments find no support in the record.

A. The Judge intervened only to aid the jury in understanding the proceedings and not to hinder the defense.

1. Appellant argues that the trial judge injected himself into the proceedings by overly assisting direct examination of Pineda by the Assistant United States Attorney and impeding the cross-examination of Pineda by the defense. We believe that each of the instances assigned as error by appellant can be explained as a proper exercise by the trial judge of his discretion and duty to clarify testimony. *United States* v. *Tyminski*, 418 F.2d 1060, 1062 (2d Cir. 1969), *cert. denied*, 397 U.S. 1075 (1970); *United States* v. *DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States* v. *Brandt*, 196 F.2d 653, 655 (2d Cir. 1952).

At the outset it is important to note that these defense contentions center on examination of only one witness in the entire trial—Alberto Pineda. In addition, we submit that it is highly significant that English is not Mr. Pineda's native language. Thus, Mr. Pineda testified that

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[6] Appellant expressly disavows any claim that Judge Bartels "deliberately and intentionally" (Brief, p. 8, n.) sided with the prosecution. We do not understand, therefore, that appellant claims that the evidentiary rulings of the Court were the result of any bias in favor of the United States. Accordingly, we are somewhat at a loss to understand why counsel has included in Point I of his brief, which involves a claim of improper conduct by the trial judge, a claim that purely evidentiary questions were improperly ruled upon by the Court.

he first came to the United States from Panama in 1971 (66). It is submitted that Mr. Pineda speaks English with a thick Spanish accent which makes him often difficult to understand.[7]

A second problem that attached to Mr. Pineda's testimony, and not to that of other witnesses, was the inherent difficulty in recounting statements made practically simultaneously by several persons involved in the same conversation at the same location. It is of course true that a jury is entitled to know what is said by each person who may be present at a meeting if the witness can remember what was said; such information, however, is difficult to present in court except through questions that may be somewhat leading.[8]

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[7] Judge Bartels stated, at one point during Mr. Pineda's testimony: "It's difficult for [him] to speak clearly and it's not his fault, we want to have the jury understand what he is talking about. It may be necessary to have a few leading questions to have that result" (111).

[8] Appellant asserts that the "extent to which the Assistant United States Attorney (and the Court) led the informer was egregious." The Government submits that Rule 611 of the Federal Rules of Evidence, cited by appellant, provides ample support for the discretion of the trial judge to allow such leading questions as were asked in the instant case. The Rule provides, in relevant part:

> (a) Control by court.—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time.
>
> (c) Leading questions—Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop his testimony.*

The Advisory Committee's notes accompanying the Rule makes it clear that while "the rule continued the traditional view that the suggestive powers of the leading question are as a general proposition undesirable", there are "numerous exceptions" such

[Footnote continued on following page]

In the first instance set forth by appellant (Brief, pp. 10-11) Judge Bartel's purpose was to clarify the introduction of the individuals who had participated in the drug negotiations.[9] The judge never suggested to the witness what answer was desired. In the next instances cited by appellant (Brief, pp. 11-12) the judge did not anticipate testimony. The use of the words "come up alongside" by the judge was not an unfair restatement of the words "drove up" that had been used by Mr. Pineda, especially in view of Mr. Pineda's statement that the car then "parked in front of me" (117). Further, the judge was making a common sense deduction when he asked Mr. Pineda to clarify whether the conspirators were told during the conspiracy that Ronald Melvin was a Government agent. Finally, the contention (Brief, pp. 13-14) that Judge Bartels rehabilitated Mr. Pineda's testimony is without foundation. The judge's statement concerning the case report (189) was a fair reiteration of what Pineda's testimony had been (187-88).

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as "the adult with communication problems." The notes go on to state: "An almost total unwillingness to reverse for infractions has been manifested by appellate courts. . . The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command." The Government submits that in the instant case, where Mr. Pineda did have language problems, the trial judge acted properly within his discretion in allowing some harmlessly leading questions to be asked of Mr. Pineda. See also 3 Wigmore, Evidence §§ 770, 774-78 (Chadbourn rev. 1970).

[9] Mr. Pineda's testimony was further complicated by the fact that appellant had been introduced to Pineda as "David", which added another name, but not another man, into the picture.

Appellant (Brief p. 10) points out that the trial judge stated "We can ask who was there," at one point of Mr. Pineda's direct examination. This remark came immediately after defense counsel asked the court "Can *we* determine who took part in the conversation?" (82).

In sum, an examination of the record in this case reveals none of the frequent rehabilitation of a prosecution witness whose credibility had been undermined by defense counsel as existed in *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973). Moreover, in urging that the prosecution was the beneficiary of Judge Bartel's conduct, appellant has failed to mention at least two instances where the trial judge assisted defense counsel in emphasizing inconsistencies or omissions in prior reports or testimony of Government witnesses.[10]

2. Appellant's complaint of the frequency and effect of judicial interruption of defense counsel's summation does not require reversal. Examination of the record reveals that defense counsel's comments strayed far from the evidence, after the judge's initial warning to "make comments on the evidence only", and seemed almost calculated to invite interruption (498).

As to the number of times Judge Bartels was required to interrupt counsel's summation, appellant asserts that "there was a total of approximately forty instances in a

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[10] During Agent Melvin's cross-examination there appears the following colloquy (282-83):

> The Court: In these grand jury minutes you refer to Luis as the source at all times; is that right?
>
> The Witness: I believe so, yes.
>
> The Court: I believe maybe the Government will stipulate in this testimony at no time was anybody else mentioned as the source. In fact, there was no mention of David or Jose LaBoy, in these minutes.
>
> Mr. Adlestein: The Government would so stipulate.

Again, during cross-examination of Agent Jones, the court aided the defense (312):

> The Court: You think that's an inconsistency between "up in the apartment," and "involved?"
>
> Mr. Peltz: Yes, people could be in the apartment and not be involved. I think that's a question of fact for the jury. That's why I brought it out. If I'm incorrect, I'll abide by your Honor's ruling.
>
> The Court: I'll permit it.

one-hour summation of interruption" (Brief, p. 20). We have examined the summation and the only way in which the figure 40 can be derived is by counting the number of separate times that Judge Bartels actually spoke during the dozen or so colloquies that he had with counsel during the summation. Indeed, one of these colloquies was precipitated by counsel himself when, in an ingratiating manner, he interrupted his own summation to ask a needless question of the court.[11]

The judge interrupted defense counsel on various justifiable instances: defense counsel apologizing for his own performance (498); comment that the Government chemist had not seen appellant in possession of the cocaine (503-04); asking the jury if they would convict their own relatives on the testimony of the informant (511-12); calling the Government chemist a "Rosemary Woods" (518); referring to "Petrocelli"[12] and "Perry Mason" (519); misquoting the defendant's testimony (521). That the defense attorney was in effect goading the judge to interrupt him may be seen in his comment. "I hope his Honor will not get angry if I call [the chemist] a regular Rosemary Woods."[13] Almost immediately afterwards defense counsel uttered the names "Petrocelli" and "Perry Mason" (519) even though the judge had given him ample warning that such comments would be

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[11] Counsel, even though it was mid-afternoon, and despite the fact that the Court had just ruled on the several requests to charge, was impelled to interrupt his own summation and ask the Court if it was "charging today" (499).

[12] "Petrocelli" is a current popular TV "lawyer".

[13] Counsel's allusion to prominent persons was not restricted. Thus he had the temerity to ask Agent Melvin on cross-examination:

> "During this time of December 1974, wasn't John Bartels, Jr., the chief of the whole DEA?

With commendable restraint, Judge Bartels, following the prosecutor's objection, excused the jury and then reprimanded counsel for this wholly gratuitous remark about the Judge's son (256).

deemed to be outside the evidence. At one point the defense attorney needlessly extended colloquy with the judge and accused the judge of "lecturing" (509-511).

In the face of this conduct by defense counsel Judge Bartels remained careful not to admonish the defense attorney in such a way as to reflect any opinion by the Court to the jury on how the case ought to be decided. As in *United States* v. *Boatner*, 478 F.2d 737, 740 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973), "[t]he trial court's comments were directed exclusively at the conduct of appellant's counsel, not . . . at . . . the strength of [appellant's] case." This Court has further held that interruption by a trial judge of a defense summation may not only be proper, but may even be "demanded." *United States* v. *Mieles*, 481 F.2d 960, 963 (2d Cir. 1973). The Government submits that the comments of defense counsel were beyond the bounds of proper summation, *United States* v. *De Angelis*, 490 F.2d 1004, 1011 (2d Cir.) (concurring opinion), *cert. denied*, 416 U.S. 956 (1974) and the judge had good cause to intervene. As this court has recently recognized, liberties taken by defense counsel may call for "correction" by the court. *United States* v. *Estremera*, — F.2d — (2d Cir. Slip op. 1693, 1704; Feb. 2, 1976).

A trial judge is charged with an "active responsibility to see that a criminal trial is fairly conducted." *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). Judge Bartel's conduct comported with that responsibility. See also *United States* v. *Mieles*, *supra*; *United States* v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975).

B. The Court did not err in permitting Agent Melvin to testify on the post transaction statements of the informant

Appellant contends that the Court erred in allowing the Covernment to rehabilitate the testimony of Alberto

Pineda by the introduction through Agent Melvin of prior consistent statements of Pineda. Appellant agrees that the applicable provision is Rule 801(d) of the Federal Rules of Evidence which provides, in relevant part:

> A statement is not hearsay if . . . The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .

It is appellant's argument that a prior consistent statement may be entered into evidence *only* through the person who originally uttered it, presumably on re-direct examination. This argument is supported neither by the language of the Rule by precedent, nor by logic. The use of the word "declarant" in the Rule signifies the person whose statement is being introduced and not the person who is the medium for the introduction of the statement. It would accomplish very little to enter *into evidence* a prior consistent statement through the person who made it; cross-examination on the declarant's in court statements automatically affects anything the declarant says about prior statements. Only through introduction of a prior consistent statement through a second person can the declarant's testimony in actuality be bolstered.[14]

Examination of the record discloses that the cross-examination of Pineda was designed in large part to show that the involvement of appellant in the transaction, as apart from Luis LaBoy and Willie Cruz, was a recent

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[14] Appellant's assertion that Mr. Pineda was not available to be cross-examined as to his prior consistent statements is not accurate. The record shows that Mr. Pineda testified on what he told Agent Melvin had occurred at 88 Stone Avenue on November 21, and that Mr. Pineda testified extensively on his statements to Agent Melvin or other agents on December 3, 1974 (105-06, 118, 127-28, 129-30, 136).

fabrication of Pineda (176-92, 197-99). It was implicit in the entire defense case that the desire to bring appellant to justice did not arise until appellant's arrest and accordingly, that prior to the arrest Pineda had not implicated appellant in any statement to the Drug Enforcement Administration. The purpose of the admission of the prior consistent statements of Pineda was to show that, in fact, he did tell Agent Melvin of appellant's involvement (under the pseudonym "David") both prior to and simultaneously with the arrest. This and other Courts have held repeatedly that consistent statements made prior to the commencement of a motive to fabricate may be introduced through a person other than the declarant. *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States* v. *Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U.S. 391 (1957); *United States* v. *Rodriguez*, 452 F.2d 1146 (9th Cir. 1972); *United States* v. *Mitchell*, 385 F. Supp. 161 (D.D.C. 1974). See also IV Wigmore, Evidence § 1129 (Chadbourn rev. 1970). Under the circumstances of this case, when viewed in light of this precedent, the judge's ruling was proper.

POINT II

The Court's jury charge on the crime of conspiracy was entirely proper.

Appellant alleges that the trial court "neglected to charge any scienter with respect to conspiracy." (Appellant's Brief, p. 21) Appellant argues that under *United States* v. *Massiah*, 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964), it is necessary for a Court to charge that a defendant cannot be found

guilty unless, with respect to an alleged conspiracy, there is knowing and wilful participation, intent to advance the scheme, and specific intent to commit a crime. It is asserted that the court never charged on the element of knowing and wilful membership in the conspiracy or on specific intent to commit a crime (Appellant's Brief, p. 23). No objection was taken to the court's charge. Accordingly, appellant's claim must be one of plain error.

Appellant's rendition (Brief, p. 22) of the Court's charge on the crime of conspiracy is incomplete. The Court's charge was sufficient under every standard enunciated in *United States* v. *Massiah*, *supra*, and other cases. See *Irizarry* v. *United States*, 508 F.2d 960, 966 (2d Cir. 1974) and cases cited therein. It is submitted that the Court adequately covered the element of knowing and wilful participation in the scheme when the jury was told:

> You must find that each defendant not only knows of the objects of the conspiracy, but that in order to promote his own interest or because he has a stake in the venture, he adopts the venture as his own (557-58).[15]

Nor did the court neglect the elements of intention to advance the scheme and specific intent to commit a crime:

> It is sufficient that the minds of the parties meet understandingly on their common purpose to commit the offense . . . [a defendant is equally culpable

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[15] In addition, the judge stated at one point:
Any person coming into a conspiracy at any stage of the proceedings with knowledge that an illegal scheme or conspiracy is in operation, becomes under the law, a party to and responsible for all acts done before or after his joinder (559).

> with other members of the conspiracy] as long as he became a member of the conspiracy with knowledge of its general scope and purposes, which in this case was to knowingly and intentionally conspire to possess and distribute a quantity of cocaine (557, 560).

The Government submits that these passages from the judge's charge, combined with the judge's reference, in the passage cited by appellant, to the offense of "knowingly and intentionally distributing quantities of cocaine, or knowingly or intentionally possessing cocaine for that purpose," presented a fair and complete explanation of the crime of conspiracy to the jury.

POINT III

Evidence of appellant's participation in the conspiracy was overwhelming.

In Point III of his brief appellant LaBoy claims that there was "insufficient evidence of [his] participation in the conspiracy to sustain a conviction." The body of appellant's argument, however, seems to be urging that there was insufficient non-hearsay evidence to justify reception of the co-conspirator's statements. Accordingly, we are uncertain as to the full scope of appellant's claims. We shall assume for the purposes of this argument that he is making both a sufficiency argument as to the verdict (reasonable doubt) as well as an evidentiary argument (preponderance of the evidence) involving reception of the co-conspirator's statements. In both cases, however, appellant's contentions are frivolous.

Appellant cites *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) for the well established proposition that "before the statements of the other conspirators con-

cerning [appellant] may be used as evidence against him it must be proved that [appellant] was in fact part of the conspiracy." 463 F.2d at 689. In *Fantuzzi*, such evidence was received by the court, after defense objection, subject to connection of the defendant to the conspiracy through non hearsay evidence. 463 F.2d at 690. The Court in *Fantuzzi* found that the non hearsay evidence the Government was able to present was not adequate to show the defendant's involvement in a conspiracy. The *Fantuzzi* defendant was not shown to have taken any incriminatory actions or to have uttered or adopted incriminatory statements.

The instant case is clearly different from *Fantuzzi*. Alberto Pineda testified that appellant directly participated in the conversations on the cocaine transaction. Appellant participated in taking out, weighing, and sniffing the cocaine. Co-conspirator statements were not received subject to connection; defense counsel did not object to their receipt. Because of these facts, and others now to be discussed in connection with the issue of the overall sufficiency of the evidence, appellant's argument predicated on *Fantuzzi* should be rejected. *Compare*, *United States* v. *Tramunti*, 513 F.2d 1087, 1108-09 (2d Cir. 1975); *United States* v. *Cirillo*, 499 F.2d 872, 884 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974) (appellant Lilienthal). Cf. *United States* v. *Kaplan*, 510 F.2d 606, 609 (2d Cir. 1974), *reversing on other grounds, remanded for new trial.*

Even apart from the declarations of appellant's co-conspirators brought out through Alberto Pineda's testimony, which were clearly admissible against appellant, see also, *United States* v. *Torres*, 519 F.2d 723, 725 (2d

Cir. 1975), Federal Rules of Evidence, Rule 801(d)(2)(E), the evidence against appellant was overwhelming. The actions of appellant on the street in the vicinity of 88 Stone Avenue, and especially his attempted flight from the scene, were recounted by Drug Enforcement Administration Agents Jones and Carr. The jury was shown and told about the small package of cocaine seized directly from appellant. An expert chemist testified that in his opinion this cocaine came from the same original package as the cocaine seized from Luis LaBoy.

Finally, it is submitted that appellant in his own testimony corroborated much of the Government's case, and, in large part, his testimony was unworthy of the jury's belief. This case, like *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), was one in which "proof of guilt was clear and convincing [and] the verdict was ensured by the defendant's words . . ." See also, *United States* v. *Lubrano*, — F.2d — (2d Cir. Slip op. 1361; decided December 30, 1975); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973).

POINT IV

There was no material variance between indictment and proof; nor did the defense attorney timely object on grounds now asserted for the first time.

Appellant argues that the Government, in not naming Alberto Guinone as co-defendant or co-conspirator in the indictment in the instant case, failed adequately to apprise appellant of the fact that the Government would adduce proof linking Guinone to the conspiracy. Failure of the Government so to do, it is asserted, produced a "fatal variance" between the charge brought and the proof at trial.

While the prosecutor may not "modify the theory and evidence upon which [an] indictment is based," *United States* v. *Silverman*, 430 F.2d 106, 110 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), this Court has long held that "out-of-court declarations of a co-conspirator are admissible against a defendant where joint venture is shown by the evidence, although conspiracy is not alleged in the indictment." *United States* v. *Alsondo*, 486 F.2d 1339, 1347 (2d Cir. 1973), *rev'd on other grounds*, 420 U.S. 671 (1975), and cases cited therein. There is, in addition, support for the proposition that the co-venturer about whom evidence is introduced, need not be named as a defendant or unindicted co-conspirator. See *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Smith*, 343 F.2d 847, 849 (6th Cir.), *cert. denied*, 382 U.S. 824 (1965); *United States* v. *De Cavalcante*, 440 F.2d 1264, 1272 (3d Cir. 1971). The Government submits that admission of testimony on the actions and statements of Alberto Guinone, clearly in furtherance of the conspiracy for which appellant was tried, was entirely proper.

At the very least, this Court should find that appellant's right to make this argument on appeal is precluded by failure of defense counsel to make a proper objection during the trial. Indeed, examination of the record shows that not only did defense counsel fail to object when Guinone's name was first mentioned (77), but he objected in order to further particularize the conversations in which Guinone had taken part (82, 85). In *United States* v. *Messina*, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968), this Court found that failure of defense counsel to "make proper objection" to testimony of an unindicted supplier of false documents to car thieves foreclosed objection to such testimony on appeal. The Government submits that the *Messina* case is directly apposite. *See also*, *United States* v. *Domenech*, 476 F.2d 1229, 1232-33 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973).

POINT V

The Government's decision to indict Israel Rodriguez was not made in order to prevent Rodriguez from testifying, and hence appellant may not claim prejudice.

This Court, in *United States* v. *Israel Rodriguez*, *supra*, Slip op.—has had occasion to analyze the Government's motives in indicting Israel Rodriguez. After stating that the timing of the Rodriguez indictment stemmed from justifiable practices of the United States Attorney's Office, Slip op. at 1433-34, the Court stated:

> [Rodriguez] obliquely intimates that the Government decided to indict Rodriguez solely to deter him from testifying for the *LaBoys*, but nothing in the lower court order or memorandum bears this out. On the contrary it appears that the decision to seek an adjournment in the LaBoys trial was made before the Government's attorney was informed by Rodriguez that he intended to testify against the Government. (Emphasis supplied) Slip op. at 1435 n. 3).

Appellant has failed to cite this passage to the Court; the Government submits it should be deemed to be controlling. There is, simply, nothing in this record indicating that Rodriguez was indicted after the Government was informed that Rodriguez intended to testify.

Nor has defendant been able to show that testimony of Rodriguez would have been favorable to him or that Rodriguez, who had been arrested, would have not invoked his privilege even had he not been indicted. See *United States* v. *Finkelstein*, — F.2d — (2d Cir. Slip op. 841, 851-54; December 1, 1975). In short, appellant has been unable to show any "deliberate manipulation or pre-arrangement by the United States Attorney," *United States* v.

Domenech, *supra* a 1231, and his argument should thus be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: February 13, 1976.

Respectfully submitted,

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of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 18th day of February, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Philip Peltz, Esq.
32 Court St.
Brooklyn, N. Y. 11201

Sworn to before me this
18th day of February, 1976

Notary Public, State of New York
No. 24-0983965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977

Lydia Fernandez
LYDIA FERNANDEZ